(2)

03-1369

No. [redacted]

IN THE

Supreme Court of the United States

WANDA BAKER, an individual, and
SCOTT ZALEWSKI, an individual,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

SUNNY CHEVROLET, INC., a Michigan corporation,
d/b/a WAYLAND CHEVROLET,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

DANIEL S. SAYLOR
Counsel of Record
MICHAEL D. WADE
GARAN LUCOW MILLER, P.C.
Attorneys for Respondent
1000 Woodbridge Street
Detroit, Michigan 48207-3192
(313) 446-5520

187723

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Where the civil liability section of TILA, 15 U.S.C. § 1640, provides for recovery of actual and statutory damages "[e]xcept as otherwise provided in this section," then expressly addresses claims "in connection with the disclosures referred to in section 1638 of this title" by making statutory damages available "only" for violations of §§ 1638(a)(2)-(6) and (9), did the Sixth Circuit properly conclude, consistent with the Seventh Circuit, that statutory damages are unavailable for violations of § 1638(b)(1)?

II. Where the purchasers were given their actual installment sale contract in advance of signing, accurately disclosing all credit terms mandated under § 1638(a) of TILA, but in a manner violative of § 1638(b)(1) since it was not given in a form they could keep, did the Sixth Circuit properly reject Petitioners' claim that the § 1638(b)(1) violation itself constitutes a violation of all § 1638(a) subsections (thus supporting recovery of statutory damages), where such a construction would defeat the clear legislative intent to exclude § 1638(b)(1) from the set of § 1638 subsections that, when violated, support recovery of statutory damages?

PARTIES AND RULE 29.6 STATEMENT

Respondent concurs with Petitioners' identification of the parties. There is no parent corporation or publicly held company owning 10% or more of the respondent corporation's stock. The only public corporation having a financial interest in the outcome of this matter is the Universal Underwriters Group, of the Zurich Financial Group, as the liability and casualty insurer for this party.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Parties and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Counter-Statement of the Case	1
Reasons for Denying the Petition	7
THE ONLY ISSUE THIS CASE RAISES IS WHETHER VIOLATION OF TILA'S FORM OF DISCLOSURE REQUIREMENTS UNDER § 1638(b)(1) QUALIFIES FOR RECOVERY OF STATUTORY DAMAGES UNDER § 1640(a), OF WHICH SUPREME COURT REVIEW IS NOT WARRANTED SINCE THE TWO CIRCUIT COURTS THAT HAVE ADDRESSED THE ISSUE BOTH HAVE CONCLUDED, CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, THAT THE ANSWER IS "NO."	7
A. Contrary to the premise of Petitioners' main arguments, this case presents no issue concerning the correction of errors defense set forth in § 1640(b), and does not present a precedential holding in conflict with the Third Circuit.	9

Contents

Page

B. Where the civil liability section of TILA, 15 U.S.C. § 1640, provides for recovery of actual and statutory damages "[e]xcept as otherwise provided in this section," then expressly addresses claims "in connection with" § 1638 disclosures by making statutory damages available "only" for violations of §§ 1638(a)(2) – (6) and (9), statutory damages are unavailable for violations of § 1638(b)(1). 10

C. Plaintiffs' alternative theory that a § 1638(b)(1) form of disclosure violation necessarily constitutes a failure to comply with § 1638(a)'s substantive disclosure requirements is contrary to the plain meaning of the statutory provisions and would defeat the clear legislative intent of making violations of §§ 1638(a)(2)-(6) and (9) subject to statutory damages but not any other § 1638 violations. 13

Conclusion 16

TABLE OF CITED AUTHORITIES

Cases *Page*

Baker v. Sunny Chevrolet, Inc.,
349 F.3d 862 (6th Cir. 2003) ..... *passim*

Brown v. Payday Check Advance Inc.,
202 F.3d 987 (7th Cir.), *cert. den.*, 531 U.S.
820 (2000) ..... *passim*

Collins v. Ray Skillman Olds-GMC Truck, Inc.,
2001 WL 1711466 (S.D. Ind., 12/3/01) 11

Crowe v. Joliet Dodge,
2001 WL 811655 (N.D. Ill., 7/18/01) 11

Graham v. RRR, LLC,
202 F. Supp. 2d 483 (E.D. Va. 2002) 11, 15

Kilbourn v. Candy Ford-Mercury, Inc.,
202 F.R.D. 121 (W.D. Mich. 2002) 11, 12

Lozada v. Dale Baker Oldsmobile, Inc.,
145 F. Supp. 2d 878 (W.D. Mich. 2000) 14

Thomka v. A. Z. Chevrolet, Inc.,
619 F.2d 246 (3d Cir. 1980) 6, 9, 14, 15

Cited Authorities

Page

Statutes/Regulations

15 U.S.C. § 1638 ..... *passim*

15 U.S.C. § 1638(a) ..... *passim*

15 U.S.C. § 1638(b) 10, 11

15 U.S.C. § 1638(b)(1) ..... *passim*

15 U.S.C. § 1640 ..... i, 10

15 U.S.C. § 1640(a) ..... *passim*

15 U.S.C. § 1640(a)(1) 2, 10

15 U.S.C. § 1640(a)(2) 2, 4, 8, 10

15 U.S.C. § 1640(b) ..... *passim*

12 C.F.R. § 226.17(a) 7

12 C.F.R. § 226.17(a)(1) 2

12 C.F.R. § 226.17(b) 2, 7

COUNTER-STATEMENT OF THE CASE

This case arose out of the credit purchase of a 1999 Ford Escort from Respondent, Sunny Chevrolet ("Defendant"), on December 28, 2000. Petitioners (hereinafter, "Plaintiffs") allege that Baker signed a Retail Installment Sales Contract ("RISC") and took possession of the vehicle on that date. They allege that when Defendant was unable to obtain financing under the RISC, Defendant asked Baker to return to the dealership to re-execute the deal adding Plaintiff Zalewski as a buyer. A second RISC was signed on that date, January 11, 2001.

Although there has never been any dispute that Plaintiffs, in advance of signing the contract, were permitted to review and consider not only the proposed terms of the transaction but the actual retail installment sales contract that they then signed, the issue concerns the manner in which Plaintiffs were provided disclosure of the terms of credit. Plaintiffs claim that Defendant's employees failed to provide Plaintiffs a copy of the RISC "in a form the consumer may keep" at the time they signed that document. Plaintiffs claim this violates TILA, 15 U.S.C. § 1638(b)(1) ("the disclosures required under subsection (a) of this section [i.e., the terms of credit, including the amount financed, the finance charge, the annual percentage rate, etc.] shall be made before credit is extended").

On this basis Plaintiffs sought damages under the "civil liability" section of TILA, 15 U.S.C. § 1640(a).[1] Thereunder,

1. Claiming that Defendant's alleged conduct in this case was part of a regular pattern and practice, Plaintiffs moved to certify the matter as a class action. The district court denied this motion and Plaintiffs did not challenge that ruling on appeal.

against a "creditor" shown to have violated the statute, a party may recover any *actual* damages -- § 1640(a)(1), and, for violations of some but not all subsections, *statutory* damages -- § 1640(a)(2). Plaintiffs do not claim actual damages in this case. Nor do Plaintiffs contend that the substance of the cost-of-credit disclosures, as set forth on the RISC, were inaccurate, incomplete or misrepresented in any way.

The question presented below was thus limited to whether *statutory* damages are available in a claim alleging only a violation of TILA's timing and form of disclosure requirements of § 1638(b)(1) and its implementing provisions in "Regulation Z" (12 C.F.R. §§ 226.17(a)(1) and (b)).[2]

Plaintiffs' principal contention was that § 1640(a) should be construed so as to allow statutory damages for violations of § 1638(b)(1). They also raised an alternative argument that, even if statutory damages are unavailable for a form of disclosure violation under § 1638(b)(1), Plaintiffs nevertheless may seek statutory damages on the basis that violations of § 1638(a)'s substantive content requirements *do* support recovery of statutory damages, and a failure to meet § 1638(b)(1)'s timeliness and form of disclosure requirements should be regarded as a "complete failure to make any of the substantive disclosures required by § 1638(a)." (Brief in Support of Plaintiffs' Motion for Summary Judgment, p. 17).

---

2. Whether Defendant's alleged conduct actually would constitute a violation of 15 U.S.C. § 1638(b)(1) was never decided below, as both lower courts assumed, for the sake of argument, that it would. Whether statutory damages would be available under the terms of 15 U.S.C. § 1640(a) if there were such a violation was the dispositive issue, since it was answered in the negative.

Defendant, on the other hand, contended that Plaintiffs' allegations asserted only a violation of TILA's form of disclosure requirements, implicating § 1638(b)(1) only, and that statutory damages are not available for such a violation. Since Plaintiffs were seeking no damages other than statutory damages, Defendant was entitled to summary judgment. The district court so ruled:

> In conclusion, neither the plain meaning of 15 U.S.C. § 1640(a) nor the legislative history of this provision supports statutory damages for a violation of 15 U.S.C. § 1638(b). Additionally, Plaintiffs' argument that a failure to comply with 15 U.S.C. § 1638(b) constitutes a failure to disclose under 15 U.S.C. §§ 1638(a)(3)-(a)(6), 1638(a)(9) is not persuasive because as the Seventh Circuit [in *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000)] noted, this argument essentially rewrites the statutory damages provision. [*See* A48-A49]

In their instant Petition, Plaintiffs assert that it was Defendant's practice and policy, per a finance manager's testimony, not to give customers a copy of their RISC to keep until after the document is signed. The assertion is misleading, as the finance manager's testimony firmly established that customers typically would receive their RISC's, in the form they could keep, "at signing" -- as a matter of both policy and actual practice.

Moreover, while in this instance the evidence was that Baker finally received her copy-to-keep of the RISC about two weeks after the fact, it is undisputed that she was given the actual RISC document, which accurately disclosed all of

the transactions' credit terms, in advance of signing. Baker admitted that she was handed the RISC before signing it, that she had enough time to read the document and that she was not limited as to the time to review the document.

Thus not only did the cost-of-credit disclosures required by TILA occur before consummation, but, as Plaintiffs concede, the disclosures were fully and accurately set forth on the RISC documents they reviewed and signed. Based on these premises, and the fact that Plaintiffs were seeking only statutory damages, the district court dismissed the case because the claim concerned *not* a failure to disclose full and accurate information on the RISC document, as mandated by TILA, § 1638(a), but an alleged failure in the form of the disclosure, a § 1638(b)(1) violation, for which statutory damages are unavailable.

The court of appeals affirmed on these very grounds. *Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 871 (6th Cir. 2003) (opinion of Guy, J., joined by Daughtrey, J.). All three judges agreed that statutory damages, 15 U.S.C. § 1640(a)(2), do not apply to violations of § 1638(b)(1) by virtue of the express limitations contained within the body of § 1640(a) itself. 349 F.3d at 866-867 (opinion of Kennedy, J.) (A8-A12); *id.*, at 871-73 (opinion of Guy, J., joined by Daughtrey, J.) (A23-A28).

The appeals judges differed on the proper grounds for affirming the district court's rejection of Petitioners' "alternate theory." Judges Guy and Daughtrey agreed with the district court, following the Seventh Circuit in *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir), *cert. den.*, 531 U.S. 820 (2000), and wrote:

> As an alternative theory, plaintiffs contend that statutory damages are available because the failure to comply with the form and timing requirements of

§ 1638(b)(1) constitutes a complete failure to make any of the substantive disclosures required by § 1638(a) -- including those for which statutory damages are expressly available. This argument fails to persuade as it would turn the stated congressional intent on its head. As the *Brown* court aptly reasoned:

> [A]ccepting this argument would destroy the point of § 1640(a). What sense would it make to omit § 1632, § 1638(a)(1), (a)(2) (in part), (a)(7), (a)(8), (a)(10), (a)(11), (a)(12), and all of (b), (c), and (d) from the candidates for statutory damages if they came in through the back door on the theory that all formal shortcomings infect the disclosures of the items that *are* on the list? Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret § 1640(a).

202 F.3d at 991. *See also Kilbourn* [*v. Candy Ford-Mercury, Inc.*, 202 F.R.D. 121 (W.D. Mich. 2002)] at 127-28.

Baker, 349 F.3d at 873 (opinion of Guy, J., joined by Daughtrey, J.) (A28-A29).

In her lead opinion, Judge Kennedy likewise rejected Plaintiffs' alternative "back door" theory, but was not persuaded that *Brown*'s analysis applied to the case at bar. Rather, she found persuasive the fact that 15 U.S.C. § 1640(b) permits up to 60 days for a creditor to correct a substantive

informational error under § 1638(a), which is logically averse to the notion that a form of disclosure violation under § 1638(b)(1) would instantaneously result in a § 1638(a) violation. *Baker*, 349 F.3d at 867-70. But even if § 1638(a) were thus violated in this instance, Judge Kennedy concluded, Defendant's subsequent provision of the customer's copy of the actual RISC to Plaintiffs effectively complied with § 1640(b)'s provisions to correct the error. *Id.*, at 871 (A22-A23).

Plaintiffs unsuccessfully moved for rehearing and rehearing en banc in the court of appeals, and now have petitioned this Court for a writ of certiorari primarily based on the premise that the Sixth Circuit's decision in this case conflicts with the decision in *Thomka v. A. Z. Chevrolet, Inc.*, 619 F.2d 246 (3d Cir. 1980). Since no such conflict exists, however, and because the decision of the Sixth Circuit in this case is well founded on the plain meaning of the statutory text here at issue, the petition should be denied.

REASONS FOR DENYING THE PETITION

THE ONLY ISSUE THIS CASE RAISES IS WHETHER VIOLATION OF TILA'S FORM OF DISCLOSURE REQUIREMENTS UNDER § 1638(b)(1) QUALIFIES FOR RECOVERY OF STATUTORY DAMAGES UNDER § 1640(a), OF WHICH SUPREME COURT REVIEW IS NOT WARRANTED SINCE THE TWO CIRCUIT COURTS THAT HAVE ADDRESSED THE ISSUE BOTH HAVE CONCLUDED, CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, THAT THE ANSWER IS "NO."

At issue here are the disclosure requirements of TILA set forth in 15 U.S.C. § 1638. Within that section of the statute, § 1638(a) contains numerous substantive items of information (the "amount financed," the "finance charge," the "annual percentage rate," an so on) that creditors must include in their cost-of-credit disclosures to consumers. Within that same section of the statute, § 1638(b)(1) contains certain requirements as to the form and timing of those disclosures. Certain provisions in Regulation Z, 12 C.F.R. §§ 226.17(a) and (b), further implement the requirements of form and timeliness of the mandated disclosures.

Only a form violation of § 1638(b)(1) is raised here, as Plaintiffs do not dispute that the contract document that Plaintiffs were shown, signed and eventually given to keep, contained all of the substantive cost-of-credit disclosures mandated by TILA. Plaintiffs contend only that Defendant failed to make their disclosure "in a form the consumer may keep" until after consummation, in violation of § 1638(b)(1) of TILA and §§ 226.17(a) and (b) of Regulation Z. Plaintiffs

do not claim to have suffered actual damages; rather, Plaintiffs seek recovery of statutory damages under the civil enforcement provision of TILA, 15 U.S.C. § 1640(a).

The issues properly raised and decided in this case are whether a violation of § 1638(b)(1) will support a recovery of damages under § 1640(a)(2) (statutory damages), and if not, then whether Defendant's alleged violation of § 1638(b)(1)'s form of disclosure requirement should automatically be regarded as a violation of § 1638(a)'s substantive disclosure requirements so as to give rise to statutory damages on that basis.

The district court ruled in favor of Defendant on both points, and on both points, based on the same reasoning, the court of appeals affirmed. According to the plain language of the statute (§ 1640(a)), consumers aggrieved by disclosure violations of § 1638 may seek statutory damages, but "only" in those cases involving violations of §§ 1638(a)(2) (some), (3), (4), (5), (6), and (9).

The unmistakable intent of § 1640(a) is that statutory damages are *not* available for claimed violations of the remaining portions of § 1638, including § 1638(b)(1). For such alleged violations, a party may seek actual damages, but not statutory damages.

On these points, there is no conflict between the Sixth Circuit's holding and that of any other circuit court; to the contrary, the decision in this case is in harmony with the only other circuit court to have addressed and answered the question, *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir), *cert. den.*, 531 U.S. 820 (2000).

A. Contrary to the premise of Petitioners' main arguments, this case presents no issue concerning the correction of errors defense set forth in § 1640(b), and does not present a precedential holding in conflict with the Third Circuit.

The essential premise of Plaintiffs' petition is that the Sixth Circuit Court of Appeals construed and applied 15 U.S.C. § 1640(b) (the "correction of errors" defense) of the Truth in Lending Act in a way that conflicts with the Third Circuit's construction in *Thomka v. A. Z. Chevrolet, Inc.*, 619 F.2d 246 (3rd Cir. 1980). Since the majority of the court did not reach this issue, however, no such conflict exists.

Contrary to the position advanced by Plaintiffs, Circuit Judge Kennedy's opinion does not speak for the court. While the Kennedy opinion clearly was issued as the lead opinion, Circuit Judge Guy then wrote a "concurring" opinion ("I concur *in the result* and write separately . . .") (349 F.3d at 871) (A23), which expressly declined to address "the novel question" of whether § 1640(b) would apply "because the issue was not developed either in the district court or on appeal" (*id.*), and Circuit Judge Daughtrey joined in Judge Guy's opinion (349 F.3d at 863) (A2).

Thus, where the majority of the court, Circuit Judges Guy and Daughtrey, concurred only in the *result* reached in Judge Kennedy's lead opinion, and did not address or apply § 1640(b) (let alone reach any holding in conflict with the Third Circuit's *Thomka* decision), this case does not present any issue concerning the correction of errors defense in § 1640(b) and likewise does not present any conflict among the circuit courts of appeal. There is, therefore, no substantial reason for the Court to grant the petition for a writ of certiorari.

B. Where the civil liability section of TILA, 15 U.S.C. § 1640, provides for recovery of actual and statutory damages "[e]xcept as otherwise provided in this section," then expressly addresses claims "in connection with" § 1638 disclosures by making statutory damages available "only" for violations of §§ 1638(a)(2) - (6) and (9), statutory damages are unavailable for violations of § 1638(b)(1).

The issue that was addressed by the majority of the Sixth Circuit panel was properly held to be controlled by the plain language of the statute upon which Plaintiffs' claim is based. The right to recover damages from a creditor for violating TILA is set forth in the act's civil liability provision, 15 U.S.C. § 1640(a). This provision creates a *statutory damages* remedy for TILA violations, but only for some, and not all, violations.

Beginning with the proviso, "*Except as otherwise provided in this section*," the statute gives to those subjected to a creditor's TILA violation a right to recover certain damages. The statute proceeds to itemize actual damages, § 1640(a)(1), and statutory damages, § 1640(a)(2). It then proceeds to set forth certain exceptions, the significant one here being for those "in connection with" violations of § 1638. In pertinent part, it states:

> In connection with disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) [i.e., statutory damages] ***only*** for failing to comply with . . . paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title . . . [.]

15 U.S.C. § 1640(a) (emphasis added). Notably, § 1638(b) violations are not included among the "**only**" § 1638 violations that will support a recovery of statutory damages.

Quite clearly, then, and as the court of appeals in this case held, where the statute provides a right to recover damages "except as provided in this section," then proceeds to state affirmatively that statutory damages for violations of § 1638 are "**only**" available for violations of §§ 1638(a)(2), (3), (4), (5), (6) and (9), such damages are expressly *not* available for violations of the remaining subsections of § 1638(a) or § 1638(b).

This also was the precise holding in *Brown v. Payday Check Advance Inc.*, 202 F.3d 987 (7th Cir. 2000), *cert. den.*, 531 U.S. 820 (2000), where the court likewise construed the word "*only*" as "confin[ing] statutory damages to a closed list." 202 F.3d at 991. Because the violations alleged in *Brown* did not fall within that list, the Seventh Circuit held the plaintiffs were not entitled to statutory damages. *Id.*, at 991-92. *And no circuit court of appeals has held to the contrary.*

Nor is there even a substantial split of authority among the district courts. *Brown* itself is an affirmance of the interpretation given § 1640(a) by three district judges, and numerous other district courts have followed *Brown* or employed its analysis without citation and found it to be persuasive. *Kilbourn v. Candy Ford-Mercury, Inc.*, 202 F.R.D. 121 (W.D. Mich. 2002), and cases cited therein; *Crowe v. Joliet Dodge*, 2001 WL 811655, at *3-*4 (N.D. Ill., 7/18/01); *Collins v. Ray Skillman Olds-GMC Truck, Inc.*, 2001 WL 1711466, at *3 (S.D. Ind., 12/3/01); *Graham v. RRR, LLC*, 202 F. Supp. 2d 483, 487-88 (E.D. Va. 2002) (applying the same reasoning but not citing *Brown*). While a divergence of views did exist within Michigan's Western District, the case at bar has now resolved that minor split of authority.

Notably, Plaintiffs do not offer any support for their position from the legislative history of the subject provisions in § 1640(a); this is because the 1980 amendment that added the limiting language to the statute was expressly intended to restrict the availability of statutory damages. As the court in *Kilbourn* pointed out (quoting and citing to extensive excerpts from the legislative history):

> Congressional reports state the legislative intent to limit statutory penalties to disclosure of the amount financed; the finance charge; the total of payments; the annual percentage rate; the number, amount, and due dates of payments; any security interest; and, where applicable, the consumer's right of rescission . . . [which directly] correspond to those subsections listed in § 1640 as subject to statutory damages. *See*, § 1638(a)(2)(A), (3), (4), (5), (6), (9); § 1635.

Kilbourn, 209 F.R.D. at 127 (*cited* in *Baker*, 349 F.3d at 873, opinion of Guy., J.) (A28).

The terms of § 1640(a) could hardly be more specific as to which provisions of TILA will support a claim for statutory damages. Since "only" certain violations of § 1638 give rise to statutory damages, and Plaintiffs' claim of not receiving the RISC on time "in a form the consumer may keep" is not one of them, Plaintiffs' right of recovery was limited to any claim for actual damages. The petition for writ of certiorari should be denied.

C. Plaintiffs' alternative theory that a § 1638(b)(1) form of disclosure violation necessarily constitutes a failure to comply with § 1638(a)'s substantive disclosure requirements is contrary to the plain meaning of the statutory provisions and would defeat the clear legislative intent of making violations of §§ 1638(a)(2)-(6) and (9) subject to statutory damages but not any other § 1638 violations.

As their alternative argument below, Plaintiffs contended that they were entitled to seek statutory damages on the basis of § 1638(a)(2)-(6) and (9)'s doorway to such damages. They contended that, even if Defendant's alleged violation of § 1638(b)(1)'s timing and form of disclosure requirements will not support recovery of statutory damages, the substantive disclosure provisions of § 1638(a) should be deemed violated every time a creditor violates § 1638(b)(1). Plaintiffs, in other words, asserted a back door theory that a failure to make written disclosures in the proper form is not a disclosure at all. This argument was properly rejected.

Set forth in §§ 1638(a)(1)-(14) are several specific pieces of information that must be disclosed to the consumer in a credit transaction. These subsections provide the substance of what must be disclosed; and § 1638(b)(1) sets forth the form and timing of the disclosure. Of course, these disclosure requirements are all contained in § 1638 of TILA. Because the civil liability section of TILA, § 1640(a), specifically addresses actions for claimed violations of § 1638, and in so doing, states that "only" violations of § 1638(a)(2) (some), (3)-(6) and (9) support a claim for statutory damages, the legislative intent *not* to make statutory damages available for violations of the other § 1638 subsections is manifest.

Again, relying on the Seventh Circuit's reasoning in *Brown v. Payday Check Advance, Inc., supra.*, the court of appeals' *majority* in this case rejected Plaintiffs' claim that any § 1638(a) violation occurred here (349 F.3d at 873; A28-A29). In reaching this conclusion, the majority did not even address § 1640(b), and thus did not reach a holding in conflict with the Third Circuit's decision in *Thomka v. A. Z. Chevrolet, Inc., supra.*

Indeed, in asserting the existence of a conflict with *Thomka*, Plaintiffs materially misread Judge Kennedy's lead opinion, as well. Judge Kennedy's treatment of the correction of error defense in § 1640(b) concerned only the question of whether any § 1638(a) violation occurred in this case; it did not bear in any way on the principal issue of whether a § 1638(b)(1) violation itself gives rise to recovery of statutory damages.

Before ever reaching Plaintiffs' "alternative theory," the Kennedy opinion addresses and rejects Plaintiffs' interpretation of § 1640(a) (based on *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp. 2d 878 (W.D. Mich. 2001)), and instead accepted Defendant's interpretation (based on *Brown, supra*) that the only § 1638 subsections that, when violated, give rise to recovery of statutory damages, are § 1638(a)(2) (some), (3)-(6) and (9), and *not* § 1638(b)(1). Judge Kennedy reached this holding entirely on the strength of § 1640(a) itself, without any reliance on § 1640(b) or any rejection of or disagreement with *Thomka, supra*. 349 F.3d at 866-67 (A8-A12).

Then, in addressing Plaintiffs' "second argument in the alternative" (*id.*, at 867; A12), the Kennedy opinion analyzes whether Defendant's alleged failure to provide Plaintiffs with

their § 1638(a) disclosures *in a form the customer may keep*, but otherwise fully and accurately disclosing the content of § 1638(a)'s requirements, constituted a violation § 1638(a) so as to provide Plaintiffs an alternate route to recovery of statutory damages. Here, while noting that there was some authority going both ways (i.e., among the district courts in Michigan; there was and is no circuit court authority in conflict with Defendant's position), Judge Kennedy decided in favor of Defendant and rejected Plaintiff's back door theory.

As support for her reading of the statute, Judge Kennedy noted the availability of § 1640(b)'s correction of errors defense and reasoned that, since a creditor could avoid statutory penalties by taking corrective action up to 60 days after-the-fact when the RISC contained a substantive error, it seemed doubtful that any § 1638(a) violation would arise when the information was entirely accurate as disclosed to the consumer at signing, with the only defect being the *form* in which the disclosures were made (i.e., not in a form the customer could keep). In this regard, the Kennedy opinion construes § 1640(b) more broadly than the Third Circuit's opinion in *Thomka*, *supra*.

In the event *Thomka* is right and Judge Kennedy's reading of § 1640(b) is wrong, however, still Judge Kennedy's ultimate holding is unaffected. It would simply leave open the question of whether a § 1638(b)(1) violation regarding form and timing of disclosures automatically constitutes a substantive violation of every subsection of § 1638(a). And in this regard, without any reliance whatsoever on § 1640(b), the Sixth Circuit majority still concluded that the answer is "no," for the reasons stated by the Seventh Circuit in *Brown*, 202 F.3d at 991; *accord*, *Graham v. RRR, LLC*, 202 F. Supp. 2d 483, 489 (E.D. Va. 2002).

This case involves only an alleged form of disclosure violation, and not a failure to comply with the substantive terms of disclosure mandated by § 1638(a). Plaintiffs' contention is that permitting them to review the admittedly accurate information before signing but failing to give them a copy ("in a form that the consumer may keep") until two weeks after the transaction violated not only § 1638(b)(1) but all of § 1638(a) since the disclosure could not be deemed a "disclosure" at all. The Sixth Circuit Court of Appeals properly rejected this contention, and no conflict of authority or other substantial basis exists to warrant this Court granting review in this matter.

CONCLUSION

For all the foregoing reasons, Respondent Sunny Chevrolet, Inc., respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DANIEL S. SAYLOR
Counsel of Record
MICHAEL D. WADE
GARAN LUCOW MILLER, P.C.
Attorneys for Respondent
1000 Woodbridge Street
Detroit, Michigan 48207-3192
(313) 446-5520